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ACTION.

1. A. hired a negro from B and gave his sealed note for the hire, and added, "the slave is hired on the same terms as other slaves, for the boy Evartson." It being held that this writing only referred to the price of the negro, and was not a memorial of any other terms of the agreement, it was also *held* that, in order to recover damages for a breach of the agreements, not mentioned in the note, an action on the case and not an action of covenant is the proper remedy.—*Twidy* v. *Saunderson*, 5

2. If A. is indebted to B. and puts money in the hands of C. to pay B., B. may sue C. for money had and received to his use.—*Draughan* v. *Bunting*, 10

ADMINISTRATOR AND EXECUTOR.

1. The 17th Section of the 26th Chapter of the Revised Statutes in relation to administrators, was intended for the ease and security of the administrator, and a strict performance is required on his part. *Lee* v. *Patrick*, 135

2. Where in an action against an administrator, a reference is made to a commissioner to take an account of the administration of the assets, and the commissioner makes a report, which is confirmed, this report is conclusive and the administrator is not required to produce an outstanding judgment stated in the report, the amount of which was more than sufficient to cover the balance of the assets in his hands. *Ibid.*

ARBITRATION.

1. The power of an arbitrator is derived, entirely,

from the agreement of the parties, as expressed in the submission, and their award must be made in strict accordance with it, and must neither go beyond nor omit any thing embraced in it. *Cullifer* v. *Gilliam*, 126

2. Where the words of an arbitration are ambigous, such a construction ought to be given to them, as will best co-incide with the apparent intention of the arbitrators. *Ibid.*

3. Where the submission was in the following words, "We hereby bind ourselves to abide the damage awarded C. C. by C. J. and W. W. for the overflowing a certain tract of land, by our mill pond, this 4th of July, 1847 Signed by G. & B.;" and the award was, "We the undersigned have this day viewed the land belonging to C. C., covered by the water of the mill, *late* the property of G. and B., and do assess the damages, which the said C. C. has sustained for the year 1847 at $26 26, for the year 1848 at $23, for the year 1849, at $23, for the year 1850 at $16, and for the year 1851 at $16, and due respectively the January succeeding each year, that is, the damage for 1847 due 1st January, 1848, and so for each year; *Held*, that the arbitrators exceeded their powers and the award was void, because the apparent intention of the submission was only to refer the amount of damages due at the time of the submission. *Ibid.*

4. Where an award has been made by referees, under a rule of Court, and confirmed by the Court, it is binding on all parties, and while it remains unreversed, the judgment cannot be contradicted. *Anders* v. *Anders*, 214

ARSON.

The Act of 1846, ch 70, entitled "an Act to protect houses and enclosures from willful injury," alters the Act of 1836, 1 Rev. Stat. ch. 347, so as to reduce the offence of burning a mill-house, &c., from a felony to a misdemeanor, and substitutes the punishment of fine and imprisonment for that of death. *State* v. *Upchurch*, 454

ATTACHMENT.

1. A legacy in the hands of an executor, due to a married woman, cannot be attached for a debt of the husband. It is not his, until he reduces it into possession. *Arrington* v. *Screws*, 42

2. Process of attachment operates only on such interests of the debtor, as

exist at the time it is served, and not on such as may afterwards arise. *Ibid.*

3. Where A. had, in an attachment against B. been summoned as a garnishee and admitted that he owed B. in a certain negotiable note dated 1st of April, 1836, payable six months after date, and it appeared that before the issuing of the attachment, the note, not then being due, had been *bona fide* transferred to an indorsee, *Held*, that a judgment against A. the garnishee in the attachment, was no bar to the right of the indorsee to recover on the note. *Myers* v. *Beeman*, 116

4. Where an attachment was issued by a justice of the peace for a sum above his jurisdiction to try, and was made returnable before him or some other justice, and where the County Court permitted the plaintiff to amend the process by making it returnable to the County Court, and the Court also permitted the defendant to appeal, upon his giving bond, &c., though he had not replevied. *Held*, that the defendant was entitled to appeal, notwithstanding he had not filed a replevin bond. And *Held*, secondly, that where it appeared that the defendant was not able at the time to procure sufficient securities for an appeal, he was entitled to a *certiorari*, without shewing any merits in fact, the case disclosing, that there were questions of law, which he had a right to have decided by the Superior Court. *Britt* v. *Patterson*, 197

BANKRUPT LAW.

When a debtor has been discharged under the bankrupt law, a surety, who might have come in under the commission, cannot afterwards recover from the debtor. Consequently, where the surety appointed the debtor his executor, the residuary legatees of the surety cannot make the executor accountable for the debt. *Tubbs* v. *Williams*, 1

BASTARDY.

1. One, who appears at Court to answer the charge of being the father of a child about to be born a bastard, may, before an issue is made up, move to quash the proceedings, on the ground that the mother is a woman of color within the fourth degree. *State* v. *Long*, 488

2. If, upon such motion, the proceedings are quashed by the Court, a subsequent warrant, charging the same person with be-

ing the father, issued after the birth of the child, cannot be supported. *Ibid.*
3. The proper relief against the order to quash, if it was deemed erroneous, was by appeal or *certio rari*. *Ibid.*

BONDS.

1. A stranger may accept the delivery of a bond, and it is good, unless the obligee refuse to ratify the delivery; but in the absence of proof to the contrary such ratification is presumed. *Iredell* v. *Barbee*, 250
2. In construing a deed, all useless and unmeaning words are to be rejected, provided enough remains to make the deed sensible. Thus where a bond, purporting to be a guardian bond, was made to "I. Governor. &c. Justices of the Court of Pleas and Quarter Sessions, &c. in the sum of &c. to be paid to the said Justices or the survivors of them," the words "Justices of the Court," &c. "to be paid to the Justices," &c. are to be rejected as unmeaning, and the bond is payable to I. *Ibid.*
3. Where a Court has no power to appoint a guardian but does appoint him, and he gives bond with sureties and takes possession of the estate of the ward, it is not competent for any of the obligors in such bond to object to its validity, on the ground of want of power in the Court to make the appointment. *Ibid.*

BOUNDARY.

1. Where a grant begins on a lake, and thence runs a certain course and distance, then again a certain course and distance, then a third line a certain course & distance, thence "with the windings of the Lake-water to the beginning," *Held*, that although the distance mentioned in the third line should fail before the Lake was reached, yet it must be continued to strike the Lake, and then the boundary be along the Lake. *Literary Fund* v. *Clark*, 58
2. If the course of the third line would not go to the Lake, then from the termination of the distance on that line, a direct course must be taken to the Lake. *Ibid.*
3. A plat, annexed to a grant, cannot control the calls of the grant, where it does not lay down a natural boundary therein called for. *Ibid.*

BURGLARY.

1. There cannot be a constructive breaking, so as to constitute burglary, by enticing the owner out of

his house by fraud and circumvention, and thus inducing him to open his door, unless the entry of the trespasser be immediate or in so short a time, that the owner or his family has not the opportunity of refastening his door. *State* v. *Henry*, 463

2. As where the owner by the stratagem of the trespasser, was decoyed to a distance from his house, leaving his door unfastened, and his family neglected to fasten it after his departure, and the trespasser, at the expiration of about fifteen minutes, entered the house, without breaking any part, but through the unfastened door, with intent to commit felony. *Held*, that this was no burgalry. *Ibid.*

RUFFIN, C. J., dissented.

COMPROMISE.

An offer to compromise is not evidence to charge the party on the original cause of action. But a concluded agreement of compromise must, in its nature, be as obligatory, in all respects, as any other, and either party may use it, whenever its stipulations or statements of facts become material evidence for him. *Sutton* v. *Robeson*, 380

CONSTABLES.

1. When a claim was put into a constable's hands for collection, during the year 1839, and he was guilty of a breach of duty in not collecting it during that year, and he was reappointed for the year 1840, and the claim still remaining in his hands, he was again guilty of a similar breach of duty; *Held*, that the party injured had his election to sue on the bond of either year, or on both bonds.—*State* v. *Wall*, 20

2. *Held*, further, that the circumstance that the party injured had it in his power to recover on the second bond, if he had chosen to do so, did not mitigate the damages he had a right to recover on the first bond. *Ibid.*

3. A constable is the agent of the creditor only during the year he continues to be a constable. For his receipts after that period the creditor is not chargeable. *Ibid.*

4. In an action against a constable for a breach of his official bond, in not collecting a debt, the relator is entitled to recover at least nominal damages, when he shows neglect and unreasonable delay in the collection, although the plaintiff may have received the amount of his debt from the con-

stable after the commencement of the action. *Parish* v. *Mangum*, 210

CONTRACTS.

1. When the contract is for the delivery of a certain quantity of Tobacco, deliverable at a certain place and for a certain price, in order to entitle the purchaser to recover for a breach of the contract, he must allege and prove that he was ready to perform his part of the contract. *Cole* v. *Hester*, 23

2. Where A. contracted to deliver to B. one hundred fish stands of a certain description, and upon tendering them, B. received fifty, but refused to receive the other fifty, because they were not made according to the contract; *Held*, that this receipt of the fifty stands did not make B. responsible for the other fifty, which were not made according to contract. *Freeman* v. *Skinner*, 32

3. A. declared against B. for the breach of an agreement in writing signed by B. in the following words, "R. H. Mosby has promised to procure for my mother a pension from the Government of the U. S. supposed to be due to her as the widow of Lieut. Charles Gerard, and in the event of his doing so, I promise and oblige myself to give the said R. H. Mosby one half of the money due her on account of the said pension. Given under my hand this 3rd day of December, 1838. Charles G Hunter." *Held*, that this agreement referred to a pension to which the widow was then entitled or supposed to be entitled, and not to a pension to which she became entitled under an Act of Congress subsequently passed. *Held* further, that although the sales of pensions are by law prohibited, yet the Court could not infer from this agreement, though a jury might, that the agreement was made by the son, as the agent of his mother. It did not transfer any title to any portion of the pension, and therefore was not, on that account, in itself, invalid. *Mosby* v. *Hunter*, 119

4. *Held*, also, that upon a count for work and labor done, A. could not recover from B., because his services did not enure to the benefit of B., and therefore the law would not imply a promise.—*Ibid.*

5. Where A. rents out land belonging to B., B. cannot recover against the lessee upon a count on the agreement for rent of the

land, because there was no privity between the latter and B., unless B. can shew that A. acted as his agent. *Hardy* v. *Williams*, 177

6. For the same reason a count upon an implied assumpsit cannot be maintained by B. against the lessee, there being no privity between them, and there being an express contract by the lessee with A. *Ibid.*

7. The Clerk of a District Court of the United States furnished certain transcripts of record to a collector of the customs, who applied for them officially, and, as he stated, by the direction of one of the auditors of the United States' Treasury. *Held*, that the Clerk could not hold the collector personally responsible for his fees, but must look to the United States' Government for what was due to him. *Brown* v. *Hatton*, 319

8. The construction of a written instrument belongs to the Court and not to the jury. *Ibid.*

9. Where two persons, each out of his own stock, delivered goods to a third person to be peddled, and took a bond payable to themselves jointly for the faithful accounting therefor; *Held*, that they could recover upon a bond so taken, notwithstanding each had a separate individual interest. *Haughton* v. *Bayley*, 337

10. Where a lease is made, the rent to be paid in a part of the crop, the contract is executory, and the title to the crop made is in the lessee, until the lessor's part is separated and allotted to him, and, therefore, before that time, the lessor has no right to take possession of any part of the crop, without the consent of the lessee. *Ross* v. *Swearinger*, 481

CORPORATIONS.

1. A municipal corporation, which has authority to grade the streets, is liable to any damages which may accrue to an individual from having the work done in an unskilful & incautious manner. *Meares* v. *Comm'rs of Wilmington*, 73

2. An action in *tort* will lie against a corporation.—*Ibid.*

DECEIT.

1. Where an action was brought to recover the value of certain horses, alleged to have died from eating corn, mixed with arsenic, which the plaintiff bought from the defendant; *Held*, that if the defendant had fraudulently concealed from the plaintiff the fact, that ar-

senic was so mixed with the corn, yet the plaintiff could only recover damages to the value of the corn, provided he was informed, before he gave it to his horses, that arsenic had been mixed with it. *Stafford* v. *Newsom*, 507

2. It is not sufficient, in an action in the nature of deceit, to prove that the representations of the defendant were *calculated* to deceive, but they must be made with *intent* to deceive. *Ibid.*

DEED.

1. The signing, sealing and delivery of a deed by an agent, except where the authority is by an instrument under seal, will only be valid when they are done in the actual presence of the principal.—*Kime* v. *Brooks*, 218

2. A deed is acknowledged by husband and wife; two justices of the peace, thereupon take the private examination of the wife and report to the Court and the Court acts upon the report; *Held*, that the inference is irresistible that the two justices were members of the Court, appointed for that purpose, though no special order of appointment appears. *Etheridge* v. *Ferebee*, 312

3. It is sufficient, if the certificate of the private examination of a *feme covert* states that upon such examination, she declared that she had voluntarily *executed* the deed, without saying that *she doth now voluntary assent thereto*. *Ibid.*

4. If, upon the privy examination, the wife states, that though she was willing to convey when she executed the deed, yet she had changed her mind and was then unwilling; of course the assent of the wife could not be certified. *Ibid.*

5. It is immaterial whether the acknowledgment or the private examination be first recorded. *Ibid.*

6. Where a deed of a married woman had on it only the following entries as to its probate: "State of North Carolina, Currituck County. February Term, 1832. Personally appeared Lydia Cook, wife of John Cook, and in open Court acknowledged that she assigned the within deed of her own free will without any constraint whatever. Let it be registered. (Signed,) W. D. Barnard."

"STATE OF N. CAROLINA, Currituck Sessions, Feb. Term 1832.

"This deed from John Cook and Lydia to *Samuel Ferebee*, was exhibited and proved in open Court, by John L. Scurr, subscribing

witness. At the same time Lydia Cook, the *feme covert*, personally appeared in open Court, and being privately examined by W. D. Barnard, one of the Court appointed for that purpose, who reported, that the said Lydia Cook acknowledged the execution of said deed of her own accord and without any constraint whatever, &c. On motion ordered to be registered.

(Signed.)

S. HALL, c. c. c."

And there was also the following entry on the minute docket of the same term: "A deed from John D. Cook and wife Lydia to Wm. C. Etheridge was proven as to John Cook and wife by the oath of John Scurr, a witness thereto, and her private examination taken in open Court. Ordered regis tered."

7. *Held*, that these entries afforded no evidence that the wife had been privily examined, as required by law. *Etheridge* v. *Ash bee*, 353

DEVISES & BEQUESTS.

1. A testatrix devised as follows: "For the love and affection which I have for J. M., and to en able him to take care of my two old negroes, B. and R, who I wish to re main where I now live and support themselves, I give and bequeath the land whereon I now live," &c. *Held*, that J. M. took a valid legal estate in the land, notwithstanding the objection made, that J. M. was to take and hold the land in trust for the negro slaves. *Meredith* v. *Anders*, 329

2. A. bequeathed a negro woman to his daughter, and afterwards sold her, and kept the amount received from the sale, as alleged by the petition, to be given to the daughter, in lieu of the negro sold; but he made no alteration in his will. *Held*, on demurrer to the petition, that the daughter had no right to the price of the negro. *Snowden* v. *Banks*, 373

3. A testator devised as follows: "I give to my son, Benjamin D. Harper, all my estate after settling my debts, except the $300 above mentioned. If Benjamin does not live till of age, then I dispose of my estate as follows: I give to my sisters," &c. Benjamin died under age. *Held*, that he was entitled to the profits of the estate, (except the $300) during his life. *Albritton* v. *Sutton*, 389

DISTRIBUTEES.

1. Per NASH and PEARSON, J. The word "distributees" may be properly used in

a petition, calling an administrator to an account, to denote those, who are entitled to succeed to an intestate's estate, under our Statute of distributions. *Henry* v. *Henry*. 278

2. Per RUFFIN, C. J. The word "distributees" is not to be found in any English Dictionary or in any law book and conveys no definite idea. It therefore cannot be intended by the Court to mean those, who are entitled to distribution of an intestate's estate. *Ibid.*

DOMICIL.

1. The domicil of origin of a person continues until he acquires another, by actual removing to another country with the intention of remaining in the latter altogether or for an indefinite period. *Horne* v. *Horne*. 99
2. Two things must concur to constitute a domicil; first, residence, and, secondly, the intention to make it a home. *Ibid.*
3. And if these two concur, it makes no difference how short his residence may be in the new domicil. *Ibid.*

EJECTMENT.

1. One of several lessors in an action of ejectment has a right to have his name erased from the declaration. *Scott* v. *Sears*, 87
2. He is liable to his colessors for his proportion of the costs, but, if judgment be ultimately rendered in favor of the plaintiff, he is entitled to be reimbursed for such proportion out of the costs recovered from the defendant. *Ibid.*
3. Where a recovery in ejectment is effected on the demises of two only out of several tenants, and afterwards an action is brought for mesne profits, none but the shares of such mesne profits, to which those two tenants are entitled, can be recovered. *Holdfast* v. *Shepard*, 222
4. And it makes no difference whether the action for the mesne profits be brought in the name of the fictitious lessee or of his lessors. *Ibid.*
5. A., by virtue of an order of the County Court, founded on a judgment before a justice and an execution thereon, levied on the 8th of March 1842, issued a *venditioni exponas*, bearing teste of May Term, 1842, under which the land of B. was sold and A. became the purchaser: C. issued a *venditioni exponas* tested of May Term 1842, pursuing a *fi. fa.* tested of February Term 1842, under which the same land of B. was sold, and D. be-

came the purchaser, and having effected a recovery in ejectment, was about to turn B. out of possession, when B. accepted a lease from D. and continued in possession — *Held*, that, in an action of ejectment by A. against B, although D. who had been admitted to defend as landlord could make no defence which B. could not have made, yet B. himself might have given in evidence these circumstances to rebut A.'s claim to recover, by shewing D.'s title to be paramount to A.'s and that he (B) was D.'s tenant. *Jordan* v. *Marsh*, 234

6. In an action of ejectment, where the declaration contained several counts, some of which were on the demises of persons, who had died before the action was brought; *Held* that the Court below did right in ordering these counts to be stricken from the declaration. *Adderton* v *Melchor*, 349

EVIDENCE.

1. A. hired a negro from B. and gave his sealed note as follows, "On the 1st day of January, 1848, I promise to pay to B. one hundred and thirty dollars, the slave is hired on the same terms as other slaves, for the hire of the boy Evartson." *Held*, that this writing only referred to the price of the negro, and was not a memorial of any other terms of the agreement, and that, as to these latter, parol evidence was admissible.— *Twidy* v. *Saunderson*, 5

2. Where the declarations of one, alleged to be an agent, are offered to be given in evidence, it is incumbent on the Judge to determine, at least so far as to say, whether there is such *prima facie* evidence of agency, as to render the acts and declarations of the proposed witness those of the plaintiff. *Munroe* v. *Stubbs*, 49

3. It is the province of the Court to pass on every question of the admissibility of evidence. *Ibid.*

4. Merely serving a warrant for debt, issued by a justice, is no evidence that the officer was the agent of the plaintiff in the warrant. *Ibid.*

5. The declarations of a slave, at any particular time, as to the state of his health, are, from necessity, admissible in evidence. *Roulhac* v. *White*, 63

6. Whenever the bodily or mental feelings of an individual, at a particular time, are material to be proved, the expression of such feelings, made at or soon before that time, is

evidence, of course subject to be weighed by the jury. *Ibid.*

7. The possession of a stolen thing is evidence to some extent, against the possessor, of a taking by him. Ordinarily, it is stronger or weaker, in proportion to the period intervening between the stealing and the finding in possession of the accused; and, after the lapse of a considerable time, before a possession in shewn to the accused, the law does not infer his guilt, but leaves that question to the jury under a consideration of all the circumstances.—*State* v *Williams*, 140

8. The question of identity, where different names are alleged to relate to the same person, is one exclusively for the jury. *Toole* v *Peterson*, 180

9. Per NASH, J. A witness who has known a town for a great number of years, may give evidence of a general and uniform reputation and understanding, that the town was covered by a particular grant. *Ibid.*

10. Per PEARSON, J. and RUFFIN, C. J. The evidence cannot be received for that purpose, but is competent to shew that what was once called the town of N. was now called the town of W. *Ibid.*

11. It is a general rule, that the declarations of a party accused of a crime, made in his own favor, after the time of the alleged commission of the crime, are not evidence for him. *State* v *Hildreth*, 440

12. Proof of the hand writing of a deceased subscribing witness to a bond is not, strictly, *prima facie* evidence of the execution of the bond, though it will authorize the reading of the instrument to the jury. But the jury must weigh this, together with the other circumstances given in evidence, and, from the whole, determine whether the alleged instrument was executed or not. *Black* v. *Wright*, 447

13. It is among the strongest circumstantial proofs against a person, that he omits to give evidence to repel circumstances of suspicion against him, which he would have it in his power to give, if those circumstances of suspicion were unfounded. *Ibid.*

14. A declaration in a deed, that the land, conveyed by it, had been before granted to a certain person, is not evidence for the parties to the deed, that in fact it was thus granted. *Crump* v *Thompson*, 491

15. It has been the universal practice in this State to

permit an Attorney in a cause to give evidence, at the instance of his client. *State* v. *Woodside*, 496

16. The receipt of a deputy sheriff, shewing that he has, as deputy sheriff, received claims for collection, is good evidence in an action by the sheriff against the sureties in a bond, which the deputy has given him for his indemnity. *McIntosh* v. *Bruce*, 511

EXECUTION.

1. The lien of a *fieri facias* upon the equitable interest of a debter commences only from the time of its issuing, and not from its *teste*. *Morisy* v *Hill*, 66

2. A. by a verbal contract, agrees to convey a tract of land to B. upon condition that B would erect a house upon it. Before this was done C. levies an execution he had against B. upon his interest in the land. A. then conveys the land to D., and, with a view of overreaching C.'s execution, antedates the deed. *Held*, that the mere antedating the deed did not make it fraudulent and void. *Held*, secondly, that B., having only a parol contract for the sale of the land, had no equitable claim against A. which was liable to execution under our Act of Assembly, subjecting equitable interests in land to sale by execution.—*Patterson* v *Bodenhamer*, 96

FELONY.

One, who is present and sees that a felony is about to be committed and does in no manner interfere, does not thereby participate in the felony committed.—Every one may, upon such an occasion, interfere, to prevent, if he can, the perpetration of the felony, but he is not bound to do so, at the peril, otherwise, of partaking of the guilt. It is necessary, in order to make him an aider or abetter, that he should do or say something, shewing his consent to the felonious purpose and contributing to its execution. *State* v *D. Hildreth*, 440

FORCIBLE TRESPASS.

The gist of the offence of forcible trespass is a high handed invasion of the possession of another, *he being present*—title is not drawn in question. *State* v *McCanless*, 375

If two are in the same house, the law adjudges the possession in him, who had title; but not so, as by relation back, to make the other guilty of a forcible trespass, when the entry was without force. *Ibid.*

FRAUDS, STATUTE OF

1. Where A. has a cause of action against another, and B makes a parol promise to indemnify A., which promise is *superadded* to the claim, which A. has on his original cause of action, the statute, making void parol promises to indemnify against the default, &c. of another, will apply.—*Draughan* v *Bunting*, 10
2. But, if there is no debt for which another is, or is about to be, answerable, or if the debt of the other is discharged and the promise is *substituted*, the statute does not apply.—*Ibid.*

FRAUDS AND FRAUDULENT CONVEYANCES.

Where A. made a deed of trust to secure creditors, and it was stipulated in the deed that a sale should not take place for three years, and, in the meantime, the trustor should remain in possession of the property, consisting of lands, negroes, &c., & on the trial of a suit, the creditor, impeaching the trust, admitted that there was no actual fraud, but contended that the deed on its face was fraudulent in law; *Held* by the Court, that, whether the deed was frudulent or not was a matter for a jury, under all the circumstances, but that the Court could not, from what appeared on the face of the deed, say it was fradulent in point of law, because there might be many circumstances, in which such a deed would be good, and the creditor admitted that it was not fraudulent in fact. *Hardy* v *Skinner*, 191

1. Where a deed is absolute on its face, but it is alleged, that it was on a secret trust for the donor, with intent to defeat his creditors, it must be left to the jury to ascertain the existence of such trust.—But where a deed, made without consideration by a debtor, expresses on its face that it is made for the benefit of the debtor and his family, the Court can itself pronounce it fraudulent and void, as against a creditor then existing. *Sturdivant* v. *Davis*, 365
2. A fraudulent donee of personal property, which he has in possession after the donor's death, is answerable as executor *de son tort*. *Ibid.*

FREE PERSONS OF COLOR.

1. The term "free person of color," in our penal statutes, is to be understood in our law to mean a person descended from a negro, within the fourth

degree inclusive, though an ancestor in each intervening generation was white. *State* v. *Dempsey*, 384

GAMING.

Under the statute against gaming, Rev. Stat. ch. 34, sec. 69, the place of gaming and the place of retailing must be the same house, or, at the least, parts of the same establishment. "The premises" mean those places only, which are occupied by the retailer with the house in which he retails, as one whole. *State* v. *Black*, 378

GRANTS.

The passage the several Acts of Assembly, enlarging the time, within which grants shall be registered, makes them good and available by relation back, from the time when they are dated, as much so as if they had been registered within two years. *Hill* v. *Jackson*, 333

HOMICIDE.

1. If a white man wantonly inflicts upon a slave, over whom he has no authority, a severe blow or repeated blows, under unusual circumstances, and the slave, *at the instant*, strikes and kills, without evincing, by the means used, great wickedness or cruelty, he is only guilty of man-slaughter, giving due weight to motives of policy and the necessity for subordination. *State* v. *Cæsar*, 391

2. The same principle of extenuation applies to the case of the beaten slave's comrade or friend, who is present and instantly kills the assailant, without, in like manner, evincing, by the means used, great wickedness or cruelty.—*Ibid.*

RUFFIN, C. J., dissented.—*Ibid.*

3. In an indictment for homicide, it is the province and duty of the Court to inform the jury, upon the supposition of the truth of the facts, as being agreed on or found by the jury, what the degree of the homicide is. *State* v. *R. Hildreth*, 429

4. Where the State, in a prosecution for a homicide, relies upon the ground of express malice, the witnesses can only prove the existence of previous malice or threats, but they cannot prove the existence of the malice up to the time of the homicide and that the prisoner acted on it in slaying. It is the province of the jury to make those inferences, or not, upon the facts proved. *Ibid.*

5. When persons fight on

fair terms, and, after an interval, blows having been given, a party draws, in the heat of blood, a deadly instrument and inflicts a deadly injury, it is manslaughter only; but, if a party enter a contest, dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder.—*Ibid.*

6. Upon a quarrel, one of the parties retreated about fifty yards, apparently with a desire of avoiding a conflict; the other party pursued with his arm uplifted, and when he reached his opponent, stabbed & killed him, the latter having stopped and first struck with his fist; *Held*, that this was a clear case of murder. *State* v. *Howell*, 485

HUSBAND AND WIFE.

1. Wherever a suit will survive to a wife, she may be joined with her husband in the action. *West* v. *Tilghman*, 163

2. A distributive share, accruing to the wife during the coverture, does not vest in the husband, but will survive to the wife, unless reduced into possession by the husband. *Mardree* v. *Mardree*, 295

3. Where the wife is the sole next of kin and the husband the administrator, and the debts of the intestate are paid or assumed by him, and there are no reasons why he should hold any longer as administrator, the presumption is very strong that he held as husband, and consequently for himself. *Ibid.*

4. Where there are other next of kin besides the wife, the husband, being administrator, in order to entitle him to the property in his own right, must appear by some act to be exercising a dominion over it, not according to his duty as administrator or in the discharge of functions of a representative character, but for his own benefit and as personally the owner. Thus when the husband and the other next of kin, there being other funds for the payment of the debts, had agreed to employ the negroes, &c., on the lands of the intestate and at the end of the year to divide the proceeds of the crop among them "according to their rights as distributees;" *Held*, that this was a sufficient reduction into possession by the husband, to prevent any right of survivorship in the wife. *Ibid.*

5. Where on a divorce a *mensa et thoro*, the wife is

allowed, in part of alimony, the rent of certain lands, out of which she makes an annual saving, the husband has no right to the amount accumulated out of such saving.—*Darden* v. *Joyner*, 339

INDICTMENT.

1. An indictment, which charges that "A. B. late, &c., at, &c., with force and arms, on, &c., did publicly curse and swear and take the name of Almighty God in vain, for a long time, to wit: for the space of two hours, to the common nuisance of all the citizens of the State, and against the peace and dignity of the State," cannot be supported.—*State* v. *Jones*, 38

2. To render the offence of profane swearing indictable, the acts must be so repeated and so public, as to become an annoyance and inconvenience to the public, for then they constitute a public nuisance. *Ibid.*

3. It is not sufficient to the conviction of a defendant in such an indictment, that the State should shew by its evidence, that the defendant has been guilty of a nuisance; the indictment must charge it; it must set forth specially the whole fact with such certainty, that the Court may be able to see, judicially, that it rests on sufficient grounds. Nor will it be sufficient, if the indictment charges, that the acts were done "to the common nuisance of all the good citizens of the State," unless the facts so charged amount in law to a nuisance.—*Ibid.*

4. An indictment will lie under our Statute for feloniously taking and carrying away a runaway slave, "with intent to dispose of him to another," &c., even though the taker did not know who was the owner of the slave. *State* v. *Williams*, 140

5. Where there were different counts in a bill of indictment, one charging a taking by the prisoner with violence, and another by seduction, and each of them also charging a conveying away, with the intents required by the Statute, the jury are not bound to find in which way the taking was had, but the verdict may be general, though there are other defective counts. *Ibid.*

6. An indictment, in a case under our Statute, for the abduction of negroes, which charges that the defendant, "by violence, feloniously took," is as good as if it had averred that the defendant "felon-

iously by violence took," &c. *Ibid.*

7. In an indictment relating to the larceny or abduction of a slave, in describing him as the property of A. B., you may use indifferently the phrases, "then and there being the property, or of the proper goods and chattels, of A. B." &c., or and "the property of A. B.," after laying the value, &c., of the slave. *Ibid.*

8. In an indictment for stealing, &c., a slave, under our Statute, the words "with an intent to sell and dispose of the said slave," are sufficient. *Ibid.*

9. It is in the discretion of the Attorney General, on the trial of a capital case, to introduce on behalf of the State, only such witnesses as he may think proper. *State* v. *Stewart*, 342

10. If, on the trial of a capital offence, the counsel for the prisoner does not ask the Court to give to a mulatto witness, introduced on the part of the State, the charge required by the Act of Assembly, Rev. St. Ch. 111, Sec. 51, advantage cannot afterwards be taken of the omission of the Judge to make such charge. *Ibid.*

11. Whether such a charge was or was not given, cannot appear upon the record, unless placed there by the exceptions of one or the other party.—*Ibid.*

12. In an indictment for selling to a slave in the night time, it is not necessary to negative an order of the owner or manager, the offence having been committed in the night time. *State* v. *Robbins*, 356

13. In such an indictment, the slave is sufficiently identified by his name; a further description by giving the name of the owner, is not necessary. *Ibid.*

14. Where there are two counts in an indictment, one good and the other defective, and there is a general verdict against the defendants, the judgment will be presumed to have been given upon the good count alone. But when both counts are good and the Court gives erroneous instructions to the jury as to one of the counts, it is presumed that the judgment was given upon both counts, and a *venire de novo* will be awarded. *State* v. *McCanless*, 375

15. In this State, where one is tried, as for a felony, yet the facts averred in the indictment do not support the charge of felony, but amount to a misdemeanor, the Court

may give judgment for such misdemeanor. *State* v. *Upchurch*, 454

16. Where a defendant was convicted on an indict ment for a felony and appealed from the judgment thereon to the Supreme Court, and the error assigned in this Court was, that the facts stated in the indictment did not amount to a felony, the Supreme Court, though it reverses the judgment for this error, yet will, (under the provisions of the Act establishing the Court) give directions to the Court below to give judgment for a misdemeanor, where it appears that is the judgment, which should have been there rendered. *Ibid.*

INFANT.

An infant, being entitled to a sum of money arising from the sale of a tract of land, sold under a decree of a Court of Equity, and the same having been received by her guardian, conveyed it by a deed of trust to her separate use, and if she died without leaving a child, to her intended husband. She married and died under age and without a child. *Held*, that in a Court of Law, at least, her personal representative was entitled to recover the money so received by the guardian. *Reddick* v. *Satterfield*, 358

INSOLVENT DEBTORS.

1. In a proceeding under the insolvent laws, when the debtor has been arrested on a *ca. sa.*, it is too late for him, after giving bond and joining in an issue of fraud, to take exception to the writ of *ca. ca.* *Nixon* v. *Nunnery*, 28

2. Although the *ca. sa.* may be void, yet the Court has jurisdiction of the subject matter, and objections to any part of the proceedings must be made in apt time. *Ibid.*

3. When the creditor alleges fraud, if his specification be not sufficiently certain, and a defendant, before issue joined, objects to it, and the Court should refuse to make it certain, it would be error. But an objection to the specification is too late after issue joined. The verdict cures the defect. *Ibid.*

4. The rule is that the verdict cures all omissions or defects, which must necessarily have been passed upon by the jury. *Ibid.*

5. A verdict is not too vague when it responds to the issue. *Ibid.*

6. It is not necessary that the land, alleged to have been fraudulently con-

veyed by the debtor, should be over the value of ten dollars. The law does not permit the debtor to convey, with intent to defraud, land, or any other *visible* property, no matter how small the value. *Ibid.*

7. Where a defendant has been arrested upon *mesne* process and gives bail, and, after judgment, the bail surrenders him to the sheriff, out of term time, no execution having been issued on the judgment nor any *committur* prayed by the plaintiff, if the sheriff releases him upon a bond to appear at Court and take the benefit of the insolvent law, the sheriff is liable for an *escape*. *State* v. *Ellison*, 261

8. The Act, Rev. St. Ch. 58, in this respect, only applies to cases where the debtor, upon surrender of his bail, is ordered into custody by the Court.—*Ibid.*

9. After such surrender, if the creditor, upon reasonable notice, will not charge the party in execution, either a *habeas corpus* or a *supersedeas* would be issued by the Court. *Ibid.*

10. Although the bond of a person, arrested upon a *ca. sa.* within twenty days of the term of a Court, should be conditioned for his appearance at the next succeeding term, yet the debtor may waive this privilege, and give a bond for his appearance at the first term, and this bond shall be valid. *Hardison* v. *Benjamin*, 331

JURISDICTION.

The only jurisdiction conferred on this Court in cases at common law is appellate, after a judgment in the Superior Court. Where there has been no such judgment, the cause will not be entertained in this Court.—*McKenzie* v. *Little*, 45

LIMITATIONS, STATUTE OF

1. In an action for harboring a slave, to which the statute of limitations was pleaded, the plaintiff could not prove any act of harboring within three years before the commencement of the action, but proved that the defendant had harbored the slave for several years before that period; *Held*, that the Court should have instructed the jury that there was no evidence to rebut the plea of the statute of limitations, or from which the jury could infer any act of harboring within the three years. *Barnes* v. *Farmer*, 202

2. In cases of adverse pos-

session of land, the statute of limitations begins to run from the ouster. If the one having the right be a *feme covert*, and the seven years have expired in the lifetime of her husband, she has three years, and only three, after the death of her husband, within which to commence her suit: when the seven years have not expired in the lifetime of her husband, the two periods of seven years from the ouster, & three years from the death of the husband are concurrent, until one of them shall have run out; and then the *feme* is entitled to the other and longer period, to enter or sue. *Crump* v. *Thompson*, 491

MERGER.

A promise, made *after* a covenant, is merged, upon the same ground that a promise, made *before*, is merged, when the promise and the covenant are precisely the same, because the covenant, being a deed, is the surest and highest evidence.—*Burnes* v. *Allen*, 370

NUISANCE.

1. A stable in a town is not, like a slaughter pen or a hog style, necessarily or *prima facie* a nuisance. But if it be so built, so kept, or so used, as to destroy the comfort of persons owning and occupying adjoining premises and impairing their value as places of habitation, it does thereby become a nuisance. *Dargan* v. *Waddill*, 244
2. If the adjacent proprietors be annoyed by it in any manner, which could be avoided, it becomes an actionable nuisance, tho' a stable in itself be a convenient and lawful erection. *Ibid.*

OFFICIAL BONDS.

When a term of office (as that of sheriff) is for more than one year, the bonds given for the faithful discharge of the duties of his office at the time of the appointment, and the new bonds given from time to time afterwards, are cumulative; that is, the first bonds continue to be a security for the discharge of the duties during the whole term, and the new bonds become an additional security for the discharge of such of the duties as have not been performed at the time they are given.—*Poole* v. *Cox*, 69

PRACTICE AND PLEADING.

1. Where more damages are recovered than are demanded, the plaintiff will be permitted to remit the

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excess, and have judgment for the proper sum, on paying the costs of this Court. *Harpor* v. *Davis*, 44

2. Where there are more pleas than one, and the jury find on them all, and error is alleged in the charge of the Court only as to one, this Court must affirm the judgment below. *Munroe* v. *Stutts*, 49

3. Where a party moved to be permitted to shew a paper to a witness for the purpose of refreshing his memory, which motion was refused and an appeal taken, it must appear in the case sent up, what were the contents of the paper, that the Court may see whether they were such as were calculated to have the effect proposed. *Lee* v. *Patrick*, 135

4. Where an execution from a justice of the peace has been levied on land and returned to the County Court, where judgment is rendered for the plaintiff, he may either have an order of sale, under which he can only sell the land levied on, or he may take an execution as in other cases of judgments.—*Powell* v. *Baughan*, 153

5. A special *fieri facias* may be added to a *venditioni exponas*, whenever a *fi. fa.* itself may be sued out. *Ibid.*

6. A count for a forcible entry may be joined with a count for an assault and battery. *Flinn* v. *Anders*, 328

7. Where several persons are indicted for a trespass, it is not a matter of right for any of the defendants to insist, on the trial, that the jury should be required to pass upon the guilt or innocence of any of the others, before they pass upon the whole. This is a matter of discretion in the presiding Judge—a discretion rarely, if ever, used, except in cases, where there is no evidence against a part of the defendants, or where the Court is satisfied, that persons are made defendants, to prevent their being examined in the case, *State* v. *Bogue*, 360

8. It is the province of the Court, in which the trial takes place, to judge of the truth or sufficiency of the causes assigned for a motion for a continuance or removal of a trial.—*State* v. *R. Hildreth*, 429

PROCESS.

1. The law requires that a writ (as in this case an execution) shall be returned to the Court and not to the Clerk. *Hamlin* v. *March*, 35

2. It is true the Clerk is the officer of the Court to receive the writ, and what-

ever may be raised upon it, as his office is the place, where the records of the Court are kept and preserved. *Ibid.*

3. If the Clerk will not receive the return, when tendered to him, the officer, to discharge his duty, must return the precept and the money, if he has made it, to the Court.—They will, upon a proper representation, make such order, as the case may require, and, in a proper case, direct their officer to receive the process.—*Ibid.*

4. The death of the Clerk during term time, is no excuse for not making the return. *Ibid.*

REPLEVIN.

1. Our Act of Assembly in relation to Replevin, Rev. Stat. ch. 101, does not repeal nor supersede the common law remedy of replevin. *Duffy* v. *Murrell*, 46

2. At the common law, an action of replevin could only be maintained in cases of actual taking.—Under our statute, taking is not necessary to entitle the party injured to his remedy. *Ibid.*

3. Where an execution issues against A. and is levied *bona fide* on property in the possession of B., on the allegation that the property is really in A., the action of replevin will not lie against the sheriff. *Carroll* v. *Hussey*, 89

ROADS AND WAYS.

1. The Courts have no authority to have the lands of the citizens taken for a cart way, without the consent of the owner, except in the instance provided for by the Statute, "If any person shall be settled upon or cultivating any land, to which there is no public road leading or no way to get to or from the same, other than by crossing other persons' land." *Lea* v. *Johnston*, 15

2. Therefore where there was a public road to which access might be had, though not so convenient for the petitioner, as the cart way he prays for, the Court cannot grant the petition. *Ibid.*

SALES.

1. Where an owner of a slave stands by and sees the slave sold by another, having no title, and makes no objection, yet he is not thereby estopped from asserting his legal title.—*West* v. *Tilghman*, 163

2. The title to a slave can only be conveyed, according to the laws of this State, by a sale in writing, except when delivery accompanies the sale,

or by a gift evidenced by a written instrument, the written instrument in each case to be attested by a subscribing witness and proved and recorded. *Ibid.*

SHERIFFS.

1. Notwithstanding the language of the private Act passed in 1835, relative to the County Trustee and Sheriff of Moore County, an action in the name of the State to the use of the County, will lie against the Sheriff for not collecting and accounting for the County taxes — *State* v. *McIntosh*, 307
2. Although a sheriff is a defaulter when he is re appointed, yet his re-appointment is not thereby void. *Ibid.*
3. It is the duty of a sheriff to apply to the Clerk of the County Court in proper time for a certified copy of the tax list, and if he does not, neither he nor his sureties can avail themselves of the neglect of the Clerk to furnish such list. *Ibid.*
4. A demand is not necessary, before action brought, for money collected by a sheriff for public purposes. *Ibid.*

SLANDER.

1. In an action of slander, when the charge is made directly, the plea of justification should aver the truth of the charge, as laid in the declaration; but when the charge is made by insinuation and circumlocution, so as to render it necessary to use introductory matter to shew the meaning of the words, the plea should aver the truth of *the charge*, which the declaration alleges was meant to be made. *Snow* v. *Witcher*, 346
2. In an action of slander, by a single woman, under the Act of 1808, Rev. St. Ch. 110, where the words charged were "that she had lost a little one," "Z. S. is a credit to her," the said Z. S. being notoriously an incontinent person, and, "she better be listening to the report about herself losing a little one;" *Held*, that it was sufficient for the defendant to plead and prove that the plaintiff was an incontinent woman. *Ibid.*

SLAVES.

Where on petition of an executor, in pursuance of the directions of his testatrix, an order was passed in 1805 by the County Court, "that the said executor have leave to emancipate his said slave, he first giving bond and security as required by law," and the bond was not given till 1816, and

ever since that order, until the year 1845, the said slave and her children had been permitted to enjoy all the rights of free persons of color; *Held*, that neither the executor, whose duty it was to give the bond, nor any person claiming under or through him can take advantage of that omission, much less a mere wrong-doer, after the lapse of so many years. *Cully* v. *Jones*, 168

STATUTES, *construction of*

Every affirmative statute is a repeal, by implication, of a prior affirmative statute, so far as it is contrary to it. But the law does not favor these implied revocations, nor are they to be allowed, unless the repugnancy be plain; and where, in the latter act, there is no clause of *non obstante*, it shall, if possible, have such construction, that it shall not operate a repeal. *State* v. *Woodside*, 496

SURETY AND PRINCIPAL.

1. A surety, who seeks to recover from a co surety a rateable part of money paid, must take care to do no act, which will prevent the co-surety from having recourse against the principal. If, therefore, he release the principal, it is a discharge of the co-surety. *Draughn* v. *Bunting*, 10

2. A. brought a suit on a note, in which B. was the principal, and C. surety. B. was dead and the suit was against his administrator and C. At the return term A. entered a *nolle prosequi* against the administrator of B and took judgment against C. alone. C. having paid the debt, brought suit against the administrator of B., who in the meantime had disbursed all the assets in the payment of other debts of equal dignity with that of A. *Held*, that the administrator of B. had committed no *devastavit* as regarded C., that C. as a surety, had no further rights than A. had possessed, and A having relinquished his lien upon the assets of B by discontinuing his suit against the administrator, the right of the surety, as the substitute of his principal, to obtain priority, could only accrue from the commencement of his action against the administrator of B. *Coltraine* v. *Spurgin*, 52

TAXES.

1. Spinning machinery, used in a factory, constitutes a part of the improvements of real estate required to be assessed for taxation

under our revenue laws. *Makepeace, ex parte*, 91
2. Under the private Acts of 1831 and 1835, relating to the County of Brunswick, any three or more justices, sitting in Court, may lay the taxes. As regards this, the Act of 1835 does not repeal the Act of 1831. *State* v *Woodside*, 496
3. Although the tax list, made out by the Clerk and delivered to the Sheriff, may be defective, yet the Sheriff who receives it and acts under it, cannot make the objection. *Ibid.*
4. Where a public officer collects money due to a County, no demand is necessary, before suit brought. *Ibid.*
5. The County Trustee, where there is one, is the proper relator in an action to recover moneys due to the County, except when he is a defaulter or when he refuses to proceed against defaulters. In these cases suits may be brought by the Committees of Finance in the name of the State. *Ibid.*

TENANTS IN COMMON.

1. Where it appeared that A raised Tobacco on his mother's land, and was to have one sixth for his labor, &c; *Held*, that A. was not a tenant in common with his mother, as to one sixth, and had no property in it or lien on it. *Cole* v. *Hester*, 83
2. Where a tenant in common holds over after partition, his possession shall not be considered adverse, until a demand is made by the other tenants, unless he does some act amounting to an actual exclusive possession, which could give notice that he intended to keep out all others, or some act amounting to a disclaimer of the rights of the other tenants. *Anders* v. *Anders*, 214
3. The law permits to each tenant in common a peaceable entry upon every portion of the land held in common, but it does not justify any actual force applied to the person of his co tenant.—*Flinn* v. *Anders*, 328

TENANT AND LANDLORD.

1. Where a person, already in possession of land, takes a lease from another, and holds over after his term has expired, whether this is a case coming within the provisions of the Act, Rev. St. Ch. 31, Sec. 51, requiring bonds from tenants refusing to surrender possession, &c. *Quere?* *Phelps* v. *Long*, 226
2. But in all cases where the landlord wishes to avail himself of the provisions of that Act, he not

only must state the lease and that the term has expired, but he must also set forth in his affidavit explictly or in such a manner that the Court may necessarily or fairly draw the inference, that the tenant, after the term expired, had *refused* to surrender the possession. *Ibid.*

3. What notice to quit from a landlord to a tenant is required in this State.—*Quere? Ibid.*

4. Where a person was sued as casual ejector and the Court improperly refused the tenant permission to plead, upon the ground that he was a tenant holding over & therefore bound to give a bond as required by the Act, Rev. St. Ch. 31, Sec. 51, when it did not appear that he had refused to deliver possession, and thereupon entered judgment by default against him. *Held*, that he was entitled to an appeal. *Ibid.*

WARRANTY.

A., being tenant by the curtesy, sells land belonging to his wife, by deed of bargain and sale, in fee, with general warranty. *Held*, that the right of the heir of the wife to the land was not rebutted by the warranty. *Johnson* v. *Bradley*, 362

WILL.

1. If a testator knows what he is doing and to whom he is giving his property, his mental capacity is sufficient to enable him to make a will. *Horne* v. *Horne*, 99

2. A probate of a will in common form cannot be set aside on a petition for a reprobate, without shewing some reason, why the former probate was wrong and should not have been allowed. *Armstrong* v *Baker*, 109

3. The mere fact, that all the parties interested in the estate of the deceased were not cited in the original probate is not, of itself, a sufficient ground for a re-probate. *Ibid*

4. Especially the Court will not set aside the probate in common form, upon the petition of the widow, who admits that the will was properly proved, but desires a re-probate to enable her to enter her dissent within six months thereafter. *Ibid.*

5. In a probate of nuncupative wills, every requisition of the Statute ought to be faithfully observed; and especially the probate will not be good if the next of kin are not cited. *Rankin* v. *Rankin*, 156

6. The propounder of a will of a married woman should properly file alle-

gations in writing and on oath, setting forth the instrument or facts relied on so as to put on the record such a case as would shew that the paper propounded might be the will of the party deceased, notwithstanding her coverture. *Whitfield* v. *Hurst*, 170

7 In like manner the party contesting should put in his allegations in writing, pleading a former sentence as a bar to any further litigation, and, of course, to ordering another issue, or denying the existence of any alleged agreement or of any right in the wife to bequeath. *Ibid.*

8. And these are preliminary matters proper for the Court to decide, and not matters for the jury.—*Ibid.*

9. A Court of Probate cannot construe a marriage settlement, so as to determine whether it vested a separate estate in the wife or not. *Ibid.*

10. But where a marriage agreement gives a color to the act of the wife in making a will, that is sufficient to induce the Court of Probate to admit the paper, leaving it to the Court of Equity ultimately to construe and enforce the articles and compel the execution of the will, if made, in the view of that Court, under a sufficient authority, or by virtue of a sufficient estate in the wife. *Ibid.*

11. After an issue of *devisavit vel non* is submitted to a jury, there cannot be a definite sentence upon a paper offered as a will, but upon the verdict of the jury, unless the issue is itself set aside. *Ibid.*

12. After such an issue made up, either party has a right to insist on a verdict *Ibid.*

13. In an issue of *devisavit vel non*, where the subscribing witnesses to the supposed will disagree as to the capacity of the supposed testator, other proof may be given as to that fact, and the jury must decide upon the whole evidence. *Bell* v. *Clark*. 239

14. A petition to set aside the probate of a will, on the ground of the want of citation of the next of kin, will not be granted for that cause alone, but merits must be shewn, and it must appear that the former proceedings resulted wrongfully, and the interests of the petitioners, if under disability themselves, were not duly defended by those who undertook to defend them. *McNorton* v. *Robeson*, 256

15. A petition to set aside the probate of a will, on the ground of the newly

discovered testimony, on points to which evidence was given at the probate of the will, will not be granted, unless such testimony not only repels the adversary's charge, but also destroys his proofs, by shewing that the former verdict was obtained by surprise and perjury. *Ibid.*

16. A. made his will in 1837, in his own hand writing, but unattested, and it was placed among his valuable papers. Afterwards, in 1847, being about to leave this country, he deposited this will, together with other papers, with a friend for safe keeping. *Held*, that this did not of itself amount to a re-publication of the will, and that therefore land acquired after 1837, did not pass under it. *Battle* v. *Speight*, 288

17. The Act of 1844, ch. 83, making devises to operate upon such real or personal estate as the testator may own at the time of his death, does not apply to wills executed before the passage of that Act. *Ibid.*